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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation, *Petitioners*

v.

Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the United States Supreme Court case entitled *The Kansas Indians*, 72 U.S. 737 (1866), the controlling case for the interpretation and construction of the *Kansas Enabling Act*, 12 Stat. 126; thereby, vitiating the court of appeal's reliance on the federal circuit court opinion in *United States v. Ward*, 28 F.Cas. 397 (1863)?

2. Can the Tenth Circuit Court of Appeals judicially modify the act of Congress that allowed the State of Kansas to join the Union on the specific terms and conditions that Indian Country would be excluded from the jurisdiction and territory of the State of Kansas; thereby, overturning lower federal court decisions?

3. Did the court of appeals misconstrue the interpretation of the *Kansas Enabling Act* as developed by the Kansas state courts by failing to rely upon the Kansas Supreme Court's ruling in the case of *Parker v. Winsor*, 5 Kan 362?

4. When considered in light of its congressional legislative history, does the language of the *Kansas Enabling Act* place Indian Country beyond the civil jurisdiction and control of the State of Kansas?

5. Did the Tenth Circuit Court of Appeals misconstrue, misinterpret, and misunderstand the Indian Treaty law for the Kansas Tribes?

6. Did the Tenth Circuit Court of Appeals unilaterally modify the treaties of the Iowa, Kickapoo, and Sac & Fox Tribes by its ruling that Kansas has civil jurisdiction over Indian Country?

LIST OF PARTIES

The parties to the lower court proceedings were Petitioners: the Iowa Tribe of Kansas and Nebraska ("Iowa"),Kickapoo Tribe in Kansas a/k/a Kickapoo Tribe of Kansas ("Kickapoo Tribe"), and the Sac and Fox Nation of Missouri ("Sac and Fox"); and the Respondent was Karla Pierce, the Secretary for the Kansas Department of Revenue.

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Karla Pierce, Secretary, Kansas Department of Revenue, *Respondent*

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this proceeding on May 30, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals to be reviewed is *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 CJ C.A.R. 3222 (10th Cir. (Kan.) May 30, 2000) (NO. 99-3019).

Prior district court case reversed by the Court of Appeals is *Sac and Fox Nation of Missouri v. Pierce*, 45 F.Supp.2d 859 (D. Kan. Mar 15, 1999) (NO. CIV. A. 95-4152-DES) also known as *Sac and Fox Nation of Missouri v. Lafaver*, 31 F.Supp.2d 1298 (D. Kan. Dec 17, 1998) (NO. CIV. A. 95-4152-DES). There are two names and two

decisions, but they are the same case.

STATEMENT OF JURISDICTION

Pursuant to *28 U.S.C. §1254(1),* the jurisdiction of the United States Supreme Court is invoked. On May 30, 2000, the judgment of the United States Tenth Circuit Court of Appeals was entered in *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 CJ C.A.R. 3222 (10th Cir. (Kan.) May 30, 2000) (NO. 99-3019). On June 14, 2000, a combined Petition for Panel Rehearing and Rehearing *En Banc* for Appellees Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, and Kickapoo Tribe of Kansas was timely filed with the appellate court. On July 14, 2000, the Order denying Appellees' petition for rehearing and rehearing *en banc* was filed by the appellate court. This petition was filed within 90 days of July 14, 2000.

STATUTE INVOLVED

28 U.S.C. 1254 (1). Courts of Appeals, certiorari; certified questions:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of ceriorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;....

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, AND UNPUBLISHED CASES

1. "U.S. Constitution", Amendment V.

2. "Indian Removal Act", Act of May 28, 1830, 4 Stat. 411.

3. "An Act to Organize the Territory of Kansas," Act of May 30, 1854, ch. 59, §20, 10 Stat. 284.

4. "An Act for the Admission of Kansas Into the Union," Act of Jan. 29, 1861, ch. 20, §1, 12 Stat. 126.

5. "The Kansas Act", 18 USC 3243.

6. Kan. Stat. Ann. §79-3408 (1999).

7. Treaty with the Kickapoo, Oct. 24, 1832, 7 Stat. 391.

8. Treaty with the Kickapoo, May 18, 1854, 10 Stat. 1078.

9. Treaty with the Iowa, Sept. 17, 1836, art. 2, 7 Stat. 511.

10. Treaty with the Iowa, May 17, 1854, art. 1, 10 Stat. 1069 72.

11. Treaty with the Sacs and Foxes, May 18, 1854, art. 1, 10 Stat. 1074.

12. *Prairie Band of Potawatomi Indians, et al. v. Raymond Jackman, United States District Court for the District of Kansas, Case No.95-3268*, ("*Jackman*").

13. *Kickapoo Tribe v. Shoemaker, United States District Court for the District of Kansas, Case No. 99-4059-SAC, ("Shoemaker").*

Because of their length, the statutes and treaties above are set forth in the separate Appendix II.

STATEMENT OF THE CASE

This is a unique case. It is an action to determine if the Kansas Indian lands, including the Indian reservations are now subject to the civil jurisdiction and control of the State in Kansas.

The Petitioners are 3 of the 4 Indian Nations located within the state of Kansas: the Iowa Tribe of Kansas and Nebraska ("Iowa"), Kickapoo Tribe in Kansas a/k/a Kickapoo Tribe of Kansas ("Kickapoo Tribe"), and the Sac and Fox Nation of Missouri ("Sac and Fox"). The Petitioners will be jointly referred to as the Tribes. Respondent is Karla Pierce, the Secretary for the Kansas Department of Revenue. The Tribes seek review of the judgment of the Court of Appeals reversing the judgment of the District Court of Kansas.

This case originally started as an action to enjoin the state of Kansas from collecting tax on motor fuel distributed to the tribes' retail stations. However, because of the ruling of the Tenth Circuit Court of Appeals on the issue of whether the Indian lands are subject to the control of the state of Kansas, this case is no longer solely focused on the taxation rulings. The Writ of Certiorari is asking for review of the appellate ruling that the Indian lands, including their reservations, are subject to the civil jurisdiction of the state of Kansas. This case is about the sovereignty and jurisdiction of Indian Tribes and their property and land in Kansas.

This unique issue is clearly distinguishable from other Indian tax cases. It is an action to determine if the imposition of the Kansas motor fuel tax on the four Indian reservations is preempted by the *Kansas Enabling Act*, which expressly provides that the reservations are extraterritorial to the State of Kansas. The extra-territoriality of the reservations is affirmed by the legislative history of the *Kansas Enabling Act*, by this Court's decision in the case of *In re Kansas Indians, 72 U.S. 737 (1866)*, and by other cases including U.S. District Court and Kansas Supreme Court decisions.

The Tribes seek review of the Tenth Circuit's reversal of the District Court ruling that Kansas Enabling Act made it "...very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts states that "'...all such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas.'" *Sac and Fox Nation of Missouri v. Lafaver, 31 F.Supp.2d 1298, 1304 (D. Kan. 1998)*. The District Court found that both *Kansas Enabling Act* and the *Kansas Territorial Organic Act* made it "...very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts

states that "...all such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas." 31 F.Supp.2d at 1304.

Based on its findings that the reservations were extraterritorial to the State of Kansas, the District Court invalidated the imposition of the tax on the reservations:

> K.S.A. 79-3408(d)(1) "exempts any fuel transactions where fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas Legislature was to exempt any transaction where fuel was to be sold outside the boundaries of the state of Kansas. As the Act for Admission of Kansas Into the Union and the Organic Act both clearly exclude the Indian reservations from the boundaries of the state of Kansas, it is only reasonable that 79-3408(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations." 31 F.Supp.2d at 13

The Tenth Circuit reversed the judgment of the District Court of Kansas on May 30, 2000:

> "...under Act for Admission of Kansas Into the Union, all territory not previously exempted from the boundaries of the state of Kansas by treaty between the United States and an Indian tribe was included within the state, within its jurisdiction and within its territory." *Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 577 (10th Cir. 2000).*

The court further concluded:

> "...exemption from taxation provided by K.S.A. 79-3408(d)(1) did not apply to the [Tribes in this case] because Indian reservations within the boundaries of the State are not included as territories outside the boundaries of Kansas." *Id.*

The Tenth Circuit decision is in direct conflict with this Court's decision in *The Kansas Indians, 72 U.S. 737 (1866)*, which held that the Kansas reservations were not within the territorial boundaries and jurisdiction of the state of Kansas. "Kansas accepted her admission into the family of States on the condition that the Indian rights should remain unimpaired...." *72 U.S. at 755.* The Tenth Circuit overturned 134 years of established precedent. The Tenth Circuit cannot change an important question of federal law settled by this Court in 1866 or make a ruling that conflicts with the decision of the United States Supreme Court.

The initial jurisdiction of the U.S. Federal District Court was invoked under 28 U.S.C. 1331 and 28 U.S.C. 1362.

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION

"The pen is mightier than the sword."
Edward George Bulwer-Lytton.

What George Armstrong Custer and the U. S. Army's Seventh Calvary could not accomplish while they were encamped in and about the Kansas Indian Reservations after the Civil War, the Tenth Circuit Court of Appeals has accomplished in the case of *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 2000 (10th Cir. Kan. May 30, 2000) ("*Pierce*") with its written decision. In *Pierce* the Tenth Circuit Court of Appeals destroys the jurisdictional and territorial integrity of the Iowa, Kickapoo, and Sac and Fox Nations by holding:

> "...Under the Act for Admission of Kansas Into the Union, all territory not previously exempted from the boundaries of the State of Kansas by treaty between the United States and an Indian Tribe was included with the State within its jurisdiction and within its territory." (*Pierce, 213 F.3d 566, 577)*

(10th Circuit. 2000))

With these 45 words, the court of appeals did what the army could not – eliminate the language in the Kansas Act of Admission that protected these sovereign Indian Nations from the oppression of and annihilation by the State of Kansas.

The Petitioners plead for a grant of certiorari, so this portion of the holding in *Pierce* can be reversed. Certiorari to the United States Supreme Court should be granted for one or more of the following reasons:

1. The ruling of the Tenth Circuit Court of Appeals is in direct conflict with the only United States Supreme Court decision, *In re Kansas Indians, 72 U.S. 737 (1866)* (*"Kansas Indians"*), construing the *Act for Admission of Kansas Into the Union, 12 Stat 126* (*"Kansas Enabling Act"*);

2. This appellate decision is in direct conflict with other Kansas U. S. federal district court decisions relying upon the *Kansas Indians* construction and interpretation of the *Kansas Enabling Act*;

3. *Pierce* is also in direct conflict with the decision of the Kansas Supreme Court , the highest court for the state of Kansas, in the case of *Parker v. Winsor, 510 Kan. 362 (1870)* (*"Parker"*);

4. The *Pierce* decision is in direct conflict with the actual language of the *Kansas Enabling Act* and its legislative history;

5. The *Pierce* decision is in direct conflict with the Iowa, Kickapoo, and Sac and Fox Nations' Treaties

enticing these Tribes to move to Kansas; and

6. The *Pierce* court misinterprets and misconstrues federal law concerning tribal sovereignty and the exclusive retention of civil jurisdiction by the Iowa, Kickapoo, and Sac and Fox Nations on their Indian Reservations located in the Northeast corner of Kansas.

The portion of the *Pierce* decision that holds that the Indian Reservations are a part of the territory of Kansas is clearly erroneous, and if not reversed will result in the state of Kansas seizing by judicial fiat what could not be taken from these Indian Nation while the socio-economic policy of "*Manifest Destiny*" gripped 19th Century America and justified the expansion of the United States from the Atlantic Ocean to the Pacific Ocean even at the expense of near-annihilation of the American Indian Tribes.

Unless this decision is reviewed, these Indian Nations will be destroyed by the pen just as if it was the 19th Century – not the 21st Century.

1. DIRECT CONFLICT WITH U.S. SUPREME COURT DECISION.

First and foremost, the Tenth Circuit's decision in *Pierce* is in direct conflict with the U.S. Courts decision in the case of *In re Kansas Indians, 72 U.S. 737 (1866)* ("*Kansas Indians*"). The U.S. Supreme Court interpreted the *Kansas Enabling Act, 12 Stat 126,* in the *Kansas Indians* case, yet the court of appeals did not even mention this case. Obviously, the court of appeals wholly overlooked or intentionally ignored the controlling U.S. Supreme Court case on this issue. If it had examined the controlling case, *Kansas Indians*, this Petition for Writ of Certiorari would not be filed, because the result would have been different.

The *Kansas Indians* case was the first to construe the *"Act for Admission of Kansas Into the Union", 12 Stat. 126* ("Kansas Enabling Act"). The pertinent portion of the act states:

> "That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of persons or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until such Tribe shall signify their assent to the President of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights by treaty, law or otherwise, which would have been competent to make if this act has never past. (*Kansas Enabling Act*, 12 Stat 126)

In the *Kansas Indians* case, the United States Supreme Court recognized that the *Kansas Enabling Act* applied to the tax issues being pressed by the State of Kansas and its tax collectors on Indian reservations. The United States Supreme Court looked directly to the *Kansas Enabling Act,* and interpreted the same to exclude all Indian Reservations from the State of Kansas. The U.S. Supreme Court stated:

> ...Kansas accepted her admission into the family of

> States on the condition that Indian rights should remain unimpaired ... (*Kansas Indians*, 72 U.S. 737, 755.)

In the *Kansas Indians* case, the U.S. Supreme Court recognized that the *Kansas Enabling Act* prohibited the imposition of a state tax on Indian lands: "Kansas accepted her admission into the family of States on the condition that Indian rights should remain unimpaired." *72 U.S. 737, 755.* The Court held that the reservations are extra-territorial to the State of Kansas, and that taxation of reservation lands was prohibited under the Enabling Act. The Kansas Indians was good law in 1866 and remains good law today. It was error for the Tenth Circuit to completely ignore this controlling precedent.

Thus, the *Kansas Enabling Act* is an express federal statute that preempts the imposition of the Kansas motor fuel tax on the Kansas reservations under the federal preemption test in *White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).*

In 1866, just five (5) years after Kansas was admitted to the Union, the Untied States Supreme Court held that Indian reservations in Kansas are not within the reach of the State of Kansas, were not within the territorial boundaries and jurisdiction of the State of Kansas, and that taxation of the same was not allowed. The U.S. Supreme Court ruling in the Kansas Indians decision was good law when it was made, and it is still good law 134 years later. This case is not only good authority – it is the controlling case on this point.

For reasons unknown, the Tenth Circuit did not even address this case. It did not distinguish it, let alone recognize the importance and applicability of the same. This should not be tolerated by this court. For this reason alone, certiorari should be granted.

2. CONFLICT WITH LOWER FEDERAL COURT DECISIONS

At the outset of this section, it should be noted that the arguments for granting certiorari are directed at the Tenth Circuit decision in *Pierce* not at the lower federal district court's decisions. The U.S. Federal District Courts for the District of Kansas have consistently held that the Kansas Indian Reservations are not part of the State of Kansas, not only in the *Pierce* case, but also in two other federal district court cases: *Prairie Band of Potawatomi Indians, et al. v. Raymond Jackman, United States District Court for the District of Kansas, Case No.95-3268,* ("*Jackman*") *and Kickapoo Tribe v. Shoemaker, United States District Court for the District of Kansas, Case No. 99-4059-SAC, ("Shoemaker").*

Before addressing *Jackman and Shoemaker,* it should be noted that the federal district court for the district of Kansas, clearly understood the ramifications of its actions and stated in it December 17, 1998 ruling that the *Kansas Enabling Act* and the *Organic Act* made it "..very clear to the court that the Indian reservations are not to be considered part of the State of Kansas in any way. The plain language of both acts states that 'All such territory shall be excepted out of the boundaries and constitute no part of the territory [state] of Kansas.'" (*Sac and Fox Nation of Missouri vs. Lafaver* 31 F Supp. Sec 298, 1304 (D. KAN. 1998)) ("*Lafaver*").

Counsel submits that the trial court was correct, and the appellate court was wrong in its interpretation of the *Kansas Enabling Act* and the *Organic Act.* The trial court's decisions are in compliance with the *Kansas Indians* decision by the U.S. Supreme Court.

Furthermore, the Kansas federal district court in *Jackman* dealt with taxation of personal property of Indians domiciled on Kansas Indian Reservations. The lower held that the State of Kansas has no jurisdiction over personal property owned by Indians domiciled on Indian reservations. *Jackman* is relied upon by the state and the tribes.

If the *Pierce* decision is allowed to stand, the *Jackman* case will then be overturned by implication, and an entire new area of

personal property taxation law and litigation will be spawned by the *Pierce* decision. All of the issues already litigated in *Jackman* will have to be re-litigated. The *Pierce* case will have a significant effect on personal property taxation in Kansas as well as the Indians domiciled on the Kansas reservations.

The latest interpretation by a Kansas federal district court addressed the power of the Sheriff of Brown County Kansas to seize personal property on the Kickapoo Reservation. In *Shoemaker*, the Sheriff was attempting to exercise civil jurisdiction on the Kickapoo Reservation , but the lower court held that the Sheriff had no authority as a state elected official to serve civil process on the Kickapoo Reservation. A permanent injunction is in force against the State Sheriff from serving civil process on the Kickapoo Reservation. This case is in compliance with the *Kansas Enabling Act* as interpreted in the *Kansas Indians* case.

If *Pierce* is allowed to stand, it will cause all of the civil process issues to be re-litigated, including *Shoemaker*. *Pierce* opens disputes over who has civil jurisdiction in Indian Country spawning more litigation on this point.

Before leaving this area, it should be pointed out that the *Shoemaker* case was filed by the tribe when the Sheriff sent a deputy to the Reservation to seize a vehicle under a state court judgement. On the Kickapoo Reservation, seizure of vehicles is a serious matter, since they have often lead to more than verbal arguments. For these reasons, judicial procedures are required and self help is not allowed on the Kickapoo Reservation. The Kickapoo Tribe requires that its court and its law enforcement officials enforce the seizure of vehicles to avoid the disputes that can escalate beyond verbal abuse and lead to physical violence and use of firearms. To allow *Pierce* to stand would over rule *Shoemaker* and could have a devastating effect upon keeping the peace in Indian Country.

3. DIRECT CONFLICT WITH DECISION BY HIGHEST COURT OF THE STATE OF KANSAS

Pierce is also in direct conflict with the Kansas Supreme Court, the highest court in the state of Kansas, in its decision rendered in 1870 in the case of *Parker v Winsor*, 5 Kan 362 (1870) ("*Parker*"). In that case the State of Kansas noted that Kansas was admitted to the Union with the proviso that Indian lands, territories and rights remain unimpaired. It should be noted that *Parker* is not in conflict with the United States Supreme Court decision in the *Kansas Indians* case, nor it is in conflict with the *Kansas Organic Act* or *Kansas Enabling Act*. The Kansas Supreme Court understood the law and properly interpreted and construed the same in the *Parker* case. *Parker* like the *Kansas Indians* case is still good law and should remain the law of the land – not *Pierce*.

Moreover, thirty-four years later, the Kansas Supreme Court rendered a consistent interpretation of the same language from the *Kansas Organic Act* and the *Kansas Enabling Act* when it concluded:

> The act of congress of May 30, 1854 (10 U.S. Stat. At L., Ch. 59), organizing the territory of Kansas, and also the act of January 29, 1861 (12 U.S. Sta. At L., Ch. 20), admitting Kansas as a state of the union, each in express terms provided that nothing therein should be construed to impair the rights of persons or property then pertaining to the Indians in the territory included in Kansas, so long as the rights of the Indians should remain unextinguished by treaty with the United States, and that all lands in Kansas belonging to the Indians by treaty with the United States were excepted from, and constituted no part of, of the territory of the state of Kansas, unless by treaty of authority of the United States jurisdiction should be extended to the state.... (*In re Now-ge-zhuck, 69 Kan. 410, 413, 76 Pac. 877 (1904)*) ("*Now-ge-zhuck*").

So the court of appeals decision is in direct conflict with *Parker* and

Now-ge-zhuck on the same point of law.

It is interesting to note that the Tenth Circuit did not even address *Parker* or *Now-ge-zhuck* in its *Pierce* decision. This failure to address these two decisions from the highest state court of Kansas is justification enough for granting of certiorari.

4. DIRECT CONFLICT WITH KANSAS ENABLING ACT.

The *Pierce* decision is also an attempt to overrule and change the unique exclusionary language of the *Kansas Enabling Act* – an act of the United States Congress – thereby, depriving these Indian Nations of this law's specific and intentional protection. The *Pierce* Court simply ignores the language of the statute without an analysis of the historical and legislative reasons for this unique protective language. The *Pierce* decision is in direct conflict with the *Kansas Enabling Act's* language and history.

The *Kansas Enabling Act's* language is clear that Indian Reservations are excluded from the territory, jurisdiction and power of the State of Kansas, to wit:

> ...*Provided*, That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said Tribe shall signify their assent to the president of the United States to be included

> within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act has never passed. (*The Act of Admission of Kansas Into the Union", Act of Jan. 29, 1861, ch. 20, §1, 12 Stat. 126.*)

It should be noted that the case of *United States v. McBratney, 104 U.S. 621 (1881)* ("*McBratney*") reinforces the Petitioners position that the Indian reservations are unique and outside the control, territory, and jurisdiction of the state. In *McBratney* the *Colorado Organic Act* had similar language to the *Kansas Organic Act*, but when the Colorado Enabling Act was adopted this unique exclusionary language was dropped, so the result was the inclusion and subjection of the Indian reservations in Colorado to the state's authority. The opposite is true in this case. The exclusionary language was not dropped when Kansas was admitted to the Union, so the Kansas Indian reservations are not subject to the control of the state.

This protective or exclusionary language is unique to the *Kansas Enabling Act* – no other state of the Union was admitted with such exclusionary language – moreover, it was purposeful and necessary to the sovereignty of the Kansas Indian Nations as is seen from a brief examination of the Congressional Record.

When Kansas became a state in 1861, Congress explicitly excepted Indian lands from the jurisdiction and boundaries of the state of Kansas. Congress determined that the excepted language was necessary "...so that no man hereafter, in court or before any other tribunal, shall ever cite the act of admission as evidence that the United States Congress understood at the time that the State could take jurisdiction over these Indian lands." (*Cong. Globe, 36th Cong. 2nd Sess. 473 (1861)*). Congress further stated that "...we

understand at the time we passed the act that we are not subjecting [the tribes] to the jurisdiction of the state of Kansas." (*Id. at 445.*) For a more eloquent statement of the necessity of this protective or excepted language, one can read the words of Senator Smith of Connecticut when the Congress was considering the creation of the Kansas Territory:

> What was the object of these treaties stipulations, not to be included in the limits of any State or Territory. Was it to secure to the Indians there lands? No! Because the treaty declares, in express terms, that they shall be theirs forever. Was it secure to them the right to self-government? Not at all: for the treaties are equally explicit on that point. What, then, was the object of it! It was to protect themselves against the all - corrupting effect of our glittering gold. They had experience the bitter consequences of such seductions before...they knew that if they were included within the limits of any Territory or State, every effort would be made to get away there lands...[This provision insures] there would be no motive, either on the part of the General Government or the people of any State of Territory for disposing them of there lands." (*Congr. Globe, 33d Congress, 1st Sess. 171 (1854)*)

It can not be stated more clearly than Senator Smith did when the *Organic Act* was being debated before Congress. In short, Congress intentionally put in this language to insure that no territory or state would ever have control over the Indian reservations located in what was to become the State of Kansas. This language is obviously necessary to prevent the State and its population taking the land away from the Indians; thereby, destroying their cultures, customs, and the very nature and existence of the tribes. For the Court of Appeals to find otherwise is contrary to the language of the *Organic Act* and the *Enabling Act*, plus it is without any basis in

legislative history.

In 1861 when Kansas was petitioning Congress for admission to the Union as a state, the language of the *Kansas Enabling Act* was as hotly debated as when Kansas petitioned to be a territory of the Union. Again the debate, focused on the exclusionary language: "...We understand that the time we passed the act that we are not subjecting them to the jurisdiction of the State of Kansas..." (*Congr. Globe, 36th Congr. 1st Sess. 445 (1861)*)Congress was concerned that "...Backed by a State government, the people [of Kansas] will take the land away from the Indians, as they did in the State of Georgia." (*Id. p.472*)Furthermore, Congress was determined that the exclusionary clause was necessary and was the most significant and important clause in the same when it stated "...So that no man hereafter in court or before any tribunal, shall ever cite the act of admission as evidence that the United States Congress understood at the time that the State could take jurisdiction over these Indian lands." (Id. p. 472)

In addition, Senator Douglas stated: "We could have never opened that country [Kansas] to settlement at all if these Indian lands were not excepted from the State or Territory. We encountered all these difficulties when the *Kansas - Nebraska Act* [*Organic* Act] was passed, and we adopted this mode of excepting them out to answer their objection..." (Id. p.445)

After these congressional debates, Congress admitted Kansas into the union with the exception or exclusionary language that was included in the *Kansas Enabling Act*. This language is clear and unambiguous – never was Kansas or its people to have control or jurisdiction over Indian reservations in Kansas – no tribunal was ever to take the civil jurisdiction away from the Indians unless they assented thereto. Counsel for these tribes submits that no such assent has ever been given by the tribes before this court, nor will such an assent ever be given, for to do so is to end the very existence of the Tribes.

The Tenth Circuit is clearly outside of any judicial rules of

construction and interpretation, and in direct conflict with this unique congressional act and its clearly documented history. The decision in *Pierce* is not based upon the language of the *Kansas Enabling Act.* It is juxtaposed against the language. It is interesting to note that the *Pierce* decision does not cite the congressional legislative history. The reason is clear, the *Pierce* decision can not be supported by the same and could not be written if the congressional record had been consulted.

The *Pierce* Court is ignoring the language of the controlling Act of Congress. This is not judicially acceptable statutory construction, although it gives the state of Kansas what it wants – control over the Indian Reservations, so the state can tax them into obscurity.

5. DIRECT CONFLICT WITH INDIAN TREATIES

After the passage of the *Kansas Enabling Act,* the only ways that Kansas could ever obtain civil jurisdiction over the Indian Reservations would be by a modification of the language by another act of congress or the Indian Nations assenting thereto in a new treaty. Neither of these events have happened.

The Indian Treaties involved in this case are attached in the Appendix and indicate that all of the Indian lands were to be the Indians' home forever and free from the control of the state of Kansas. This has never changed. These treaties were presented to the lower court and were a part of the appellate record. The court of appeals simply ignored the language of the same.

For example, the October 24, 1832, Kickapoo Treaty negotiated with William Clark, Superintendent of Indian Affairs, states at Art. 2, as follows:

> The United States will provide for the Kickapoo Tribe a country to reside in, Southwest of the Missouri river, as there permanent place of

> residence as long as they remain a tribe. And whereas the said Kickapoo Tribe are now willing to remove on the following condition, from the country seated on Osage river, in the State of Missouri, to the Country selected on the Missouri river, north of lands which have been assigned to the Delawares, it is hereby agreed that the country within the following boundaries shall be assigned, conveyed, and forever secured, and its hereby sole assigned, conveyed, and forever secured by the United States to the said Kickapoo Tribe as there permanent residence.)(*1832 Kickapoo Treaty, Art. 2*)

The Iowa and Sac and Fox Tribes' Treaties have similar language.

Indeed, the Treaties of the three Kansas Tribes petitioning for certiorari contain identical language providing precisely the same guarantees and protections as those of the Wea and Miami Tribes' Treaties that were at issue in the *Kansas Indians, 72 U.S. 737, 759.* The mere passage of time (and perhaps the memory of the original intent and purpose justifying the involuntary herding of Indians on to reservation lands to make way for westward expansion, i.e. "*Manifest Destiny*") should not change this Court's historically relevant interpretation today. This language should be consistently interpreted to exclude the Tribes' respective Indian Reservations from the boundaries of the state of Kansas.

Even in the year 2000, the words of the 1866 U.S. Supreme Court set the precedent, and must be followed:

> While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and

> privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. (*Kansas Indians, 72 U.S. 737, 757*)

All three (3) tribes take the position that their treaties exclude their lands from the control, supervision, jurisdiction and power of the State of Kansas, and that their treaties have not been modified by negotiation or by an act of Congress that would give the State of Kansas civil jurisdiction on their Indian reservations.

It should be pointed out that the *Kansas Enabling Act* required the affirmative assent by the tribes before jurisdiction could be given to the State of Kansas. The tribes have never given assent to the State of Kansas for exercise of civil jurisdiction on their sovereign Indian reservations. Nor will the Kansas tribes give such assent. For to do so turns the calendar back to the 1850's and the words of Senator Smith will become reality: "...you initiate a policy which will result in the outrageous breach of numerous treaties, which you have made with the Indian Tribe's now having a resting place west of the organized State's. Nay, it is a present violation of those treaties. It will being upon them irremediable calamities, and will, within a few years, consign them to utter annihilation." (Speech by Senator Smith of Connecticut on Congressional floor.) (*Congr. Globe 33d Cong., 1st Sess. 171 (1854)*) In short, fears of congress would become reality "...backed by a state government, the people [of Kansas] will take the land away from the Indians, as they did in the State of Georgia." (*Id.*)

Unless the United States Supreme Court reverses the *Pierce* decision, the social and economic and cultural policy known as "*Manifest Destiny*" of the 19th Century, which created the United States of America and almost destroyed the Indian Cultures and

Tribes in the process, will be fulfilled by destroying the Indian cultures and Tribes in Kansas. Tribes can have no sovereignty without civil jurisdiction over there territory. This issue is of great significance and must be addressed by this court. Otherwise, the Tribes as we know them will cease to exist.

6. THE COURT OF APPEALS MISCONSTRUED THE LAW OF CIVIL JURISDICTION OVER INDIAN RESERVATIONS

The law of jurisdiction in Indian Country is complex to say the least. The Tenth Circuit Court of Appeals is not the first court of appeals that failed to understand the complexity of the same and the interrelationships between treaties, acts of congress, civil jurisdiction, and criminal jurisdiction when it deals with Indian Tribes.

Furthermore, the Tenth Circuit Court of Appeals failed to understand that just because you might have criminal jurisdiction in Indian Country that is concurrent with the federal government, the Tribal government and the State government, it does not follow that you then have similar civil jurisdiction.

In fact, it surprises even skilled Indian attorneys to discover that Kansas is not a Public Law 280 State, but is a unique State that allows concurrent criminal jurisdiction much like PL 280 States, but has retained exclusive civil jurisdiction on its Indian reservations.

The criminal jurisdiction was obtained by an act of Congress specifically "*The Kansas Act*" which provides:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State. (*18 U.S.C. 3243*)

No similar act of Congress exists to confer civil jurisdiction on Indian Reservations to the state of Kansas.

In passing the *Kansas Act*, Congress found that the Tribe's had assented to the state assuming criminal jurisdiction . This point is still vehemently denied by the Tribes.

Without arguing whether or not that assent was actually affirmatively given, the Tribes point out that only by an act of Congress could the Tribes loose there criminal jurisdiction. Judicially this could not be done. The court of appeals may not legislate such an act by its judicial decision in *Pierce*.

In fact, the *Ward* case could not judicially grant the state criminal jurisdiction, which is why *Ward* is not widely cited, and *The Kansas Act* was required even after *Ward* was decided. Had the convicted defendant appealed the decision in *Ward,* it would have been reversed. Unfortunately, the individual defendant did not appeal the decision, so it became the law of that case, and it should remain simply the law of that case and nothing more.

It should be noted that no Indian tribe, let alone, the tribes petitioning this Court, were parties to the *Ward* case. It would seem that due process clause of Ammendment V of the United States Constitution would require them to at least be given notice and a right to be heard before they were stripped of their sovereign powers.

The Tribes have never assented to the state having any civil jurisdiction on their lands. The reliance upon a criminal case, and specifically the *Ward* case, is wholly misplaced. What is said about criminal jurisdiction in *Ward* does not apply to civil jurisdiction; therefore the legal rationale and reliance of the Tenth Circuit on *Ward* is utterly erroneous.

To allow the Tenth Circuit to give the state of Kansas civil jurisdiction over Indian Reservations based on the *Ward* case is in total violation of the sound rules of treaty construction, statutory construction, and the case law of the United States Supreme Court. The *Pierce* court simply misconstrued the complex law of jurisdiction in Indian Country.

CONCLUSION

From the 1830's forward, the policy of the territories and states has been to destroy the Indian Tribes' way of life, take the Indian Tribes' lands, and subject the Indian Tribes to the laws of the territories or states. The dominant State cultures have wanted to eliminate the Indian cultures and the Indian way of life from the 19th century forward. The socio-economic movement labeled "*Manifest Destiny*", which was utilized to justify the conquest of the entire land mass of the United States from the Atlantic to the Pacific, and the supplanting and instilling of the European work ethic and life style, has been an overwhelming drive by the state governments to this date. This may be the 21st Century, but *Manifest Destiny* lives in Kansas.

From the inception of the territory of Kansas through the creation of it as a state government to this date, the state of Kansas has sought to control and destroy the Indian Reservation within its boundaries. The policies of the state of Kansas towards the Kansas Indians are same as they were in 1854 when the Kansas Territory was created and in 1861 when the *Kansas Enabling Act* was passed. The protective language of the *Kansas Enabling Act* was needed then and is still needed today.

In the *Pierce* case, Tenth Circuit hands the State of Kansas the final weapon the state needed to complete the state's *Manifest Destiny* over the Indian lands within its borders. *Pierce* gives the state the ability to complete the dismantling of the he Kansas Indians by controlling their territory and taxing them into obscurity.

The *Pierce* decision is not only an affront to the rules of judicial construction of treaties and in direct conflict with U.S. Supreme Court Decisions, acts of Congress, the *Kansas Enabling Act*, the decisions of the highest court of the State of Kansas, and the lower federal courts in the State of Kansas, but it is also judicially sanctioning ethnic cleansing by the pen instead of the sword.

It is sincerely prayed by these three (3) tribes that this U.S. Supreme Court allow them to retain there exclusive civil jurisdiction, their right to self government, their sovereignty, but most of all their culture and pride of being a member of a Native America Tribe in the State of Kansas and outside of the power, jurisdiction, and oppressive policies of the State of Kansas. The Tribe's specifically request that this court grant a writ of certiorari to correct not only the erroneous legal reasoning of the *Pierce* case, but also the social injustices that will flow therefrom.

If a writ of certiorari is not issued, the three (3) tribe's believe that what Senator Smith feared in the 1850's – complete destruction of the Indians if the states have control over the Indian Reservations – will become a reality in this new millennium. To face this reality as modern Indian Nations with brighter futures is cause for alarm and fear in the hearts of all Native Americans.

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